

SPECIFIC COMMENTS

The Q. numbers refer to the question numbers in your *Issues Paper* of May 2008.

Legislative Approach:

Q1. Legislative approaches. I would prefer a combination of principles (eg duty to provide a safe work environment for all persons found in the workplace) and performance-based standards (eg a workplace that is, so far as reasonably practicable, safe and without risks to health, including psychological health).

Q2. Act and subordinate regs, codes. The details of the regulations should depend on the specificity of the hazard (eg airborne asbestos fibres is specific, musculoskeletal disorder is non-specific) and the degree of risk (eg high risk from airborne asbestos fibres, low risk from infrequent hand pain). The regulations for specific hazards and high risks should be more detailed than that for less specific hazards and lower risks.

Q3. Title: Workplace health and safety (to include visitors and passers by).

Q4. Objectives: similar to Vic *OHS Act 2004*.

Q5. Principles: optional, eg similar to Vic *OHS Act 2004*.

Q6. No answer.

Scope, Application & Definitions

Q7. and Q8. Specific safety legislation. Ideally, a Workplace health and safety Act should be broad enough to cover all industries. Regulations should cover specific industries – especially high risk industries: mining, hazardous facilities, agriculture, building and construction.

Q9. A model OHS Act should specifically link to other appropriate legislation, eg electrical and other power Acts, essential services Acts, workers compensation Acts. A reader should be able to trace the network of legislation that could directly affect them. Ignorance of the law is not a legal defence – make it easier for us all to trace the network of laws we must obey.

Q10. The duties of care should be tied to workplaces and OHS matters arising from the conduct of the enterprise. Leave it to the courts to then interpret the extent of these requirements.

Q11. Members of the public are best covered by the reference to 'persons', per the Vic OHS Act 2004.

Q12. No – OHS law is not keeping up with the changing workplace arrangements: casualisation, short term contracts, long term contracts, labour hire. Need to make clear in the legislation that everyone found in the employer's workplace at a given time is the responsibility of the employer PLUS the responsibility of their direct employer, as defined in common law. Eg. a labour hire person's working environment is controlled principally by the host employer – even if they are working for that host for only an hour. The Host should be responsible for the site induction, work task induction and supervision of the labour hire person, AS WELL AS the labour hire company ensuring that the labour hire employee has been inducted to the industry, inducted to their labour hire company and has received appropriate induction from the host employer. The courts, have, to date, sorted out the degree of liability between all. The labour hire industry has called for the incorporation of 'degree of control' in legislation. Barry Sheriff's paper on 'The Concept of Control in Determining OHS responsibilities: A need for clarity' – establishes the need for clarification of 'degree of control' in legislation (as distinct from the more general issue of degree of liability). Clarification of 'degree of control' as an element of the OHS degree of liability in OHS legislation would assist all stakeholders to understand their responsibilities. It has become clear that 457 visa holders, young workers, people for whom English is a second language - are all vulnerable to greater instances of injury and illness and other forms of exploitation in the workplace (eg recent case in Victoria of 457 visa holders required to work when suffering from broken wrist etc). The position is complicated by the poor infrastructure that may be provided by governments and government agencies. Poor provisions for train / road level crossings in Victoria has highlighted a gap in our legislation. Truck drivers cannot be expected to comply with a variety of warnings at level crossings – some simply say there is level crossing, others specify that a train is imminent. An employer cannot be expected to control the driver for the multiplicity of decision making required by this task, when the control of level crossings has been arbitrarily determined by government agencies. Our legislation needs to take this into account, eg via a specific requirement that courts must take into account the adequacy of provision of infrastructure by governments and government agencies in these cases.

Q13. Stress management, fatigue management, bullying and exposure to violence (including witnessing violence) are issues that frequently arise in my work as an OHS

Consultant (with a workers compensation Agent). A health and safety act must incorporate reference to psychosocial issues and clearly define this term. Eg 'Psychosocial hazards are hazards which have the potential to cause injury as a result of psychological factors or social factors'.

Q14. Definition of terms. Critical definitions: 'Hazard' eg 'hazard refers to anything that can cause harm, especially a source of potentially damaging energy'; 'Risk of injury or illness' eg 'the injury or illness consequence of a hazard and the likelihood of that consequence arising'; 'Consultation' eg 'Consultation is a process of asking people for their opinions, ideas and information as part of the decision making process. Those consulted do not make the final decision; the responsible manager makes the final decision. Management should explain the reasons for the final decision to all those who participated in the consultation'; 'arising from the conduct of the undertaking'; as well as those you mention in your Discussion Paper: 'worker', 'workplace', 'control', 'reasonably practicable'.

Q15. Other issues in definitions. Legislation should encompass not just the hazards, risks and controls in the workplace and the direct system of work, but also the requirement that the total system of work in the workplace as a whole must be understood. Disasters, such as that at Longford, in part arise because no one, or only a very few people, understand the total system of work at the workplace and the implications of failure of any one element of that system. The people who should have responsibility for ensuring this are the officers of bodies corporate (per section 143 of the *OHS Act 2004 Vic*).

Duties of Care – Who owes them and to whom?

Q.16. As argued in Q.12: The labour hire industry has called for the incorporation of 'degree of control' in legislation. Barry Sheriff's paper on 'The Concept of Control in Determining OHS responsibilities: A need for clarity' – establishes the need for clarification of 'degree of control' in legislation (as distinct from the more general issue of degree of liability). Clarification of 'degree of control' as an element of the OHS degree of liability in OHS legislation would assist all stakeholders to understand their responsibilities.

Q.17. As argued in Q.12: Need to make clear in the legislation that everyone found in the employer's workplace at a given time is the responsibility of the employer PLUS the responsibility of their direct employer, as defined in common law. Eg. a labour hire person's working environment is controlled principally by the host employer – even if they are working for that host for only an hour. The Host should be responsible for the site induction, work task induction and supervision of the labour hire person, AS WELL AS the labour hire company ensuring that the labour hire employee has been inducted to the industry, inducted to their labour hire company and has received appropriate induction from the host employer.

Q.18. 'Control' should not be able to be delegated. Such a notion would become a 'lawyers feast' for the next decade or so in determining when and where it applied. It is easier when everyone understands their responsibility for OHS in the workplace and that it is not delegatable.

Q.19. No comment.

Q.20. and Q.21 and Q.24. As argued in Q.12: Need to make clear in the legislation that everyone found in the employer's workplace at a given time is the responsibility of the employer PLUS the responsibility of their direct employer, as defined in

common law. Volunteers should not be responsible for legal OHS obligations, but should be protected by them when they work in a workplace. The duties of self-employed should be to take reasonable care of their own health and safety, while protecting the health and safety of those working around them.

Q.22. I have sometimes used the word 'workers' to cover: employees, contractors, labour hire personnel and volunteers in the workplace.

Q.23. I agree with the 4 key dot points to be used for specific duties that an employer owes to everyone in the workplace (most of which duties arise from common law). I suggest that the common law duty to provide competent fellow workers be added to the list. Employers and the self-employed should also be required to take reasonable care of their own health and safety – in fairness to employees (who have the same obligation) and as a model for their workers.

Q.25. I think section 25 of the *OHS Act 2004 Vic* is sufficient in specifying the duties of employees. It includes a reciprocal duty to that of employers and forbids initiation ceremonies.

Q. 26. No comment.

Q.27. to Q.29. Sect 22(2)b of the *OHS Act 2004 Vic* requires the employer to 'employ or engage persons who are suitably qualified in relation to occupational health and safety to provide advice to the employer ...' I think this is a better provision than the Queensland act, as it retains the responsibility for OHS with the employer.

Q. 30. Yes, the duties of officers of bodies corporate should be those of sections 143 and 144 of the *OHS Act 2004 Vic*. I think the 'beyond reasonable doubt' criterion protects officers sufficiently from vexatious claims.

Q.31. In my experience, persons in control of workplaces resent their legal obligations, because they believe that they have fulfilled their duties by notifying senior management of hazards and risks – and should not have to put their jobs on the line for their employees. I disagree. I believe that managers and supervisors have a moral obligation to employees not to put them into dangerous situations (see the Melcann, North Geelong case, where a 36 yo man was asphyxiated by a robotic arm – the supervisor knowing that the interlock switch on the gate to the area was malfunctioning – death Dec 2000, case reported Sept 2003). However, I agree with managers and supervisors, that they need specific protection within a model health and safety act that if they raise ohs issues - they should not be liable to be sacked, demoted or in any other way discriminated against. Although I point to the anti-discrimination provisions of Division 9 of the *OHS Act 2004 Vic* (including the onerous reverse onus of proof), they are still skeptical that they are adequately protected.

Q.32. The person in control of the workplace should share the responsibilities of the employer, whom they represent and whom they are paid to represent.

Q.33. Yes, I believe that the lifecycle of an item or structure should be encompassed by OHS law – as it is already encompassed by environmental law. This should include the South Australian provision that prevention of foreseeable forms of misuse of plant should be included in design, installation and erection of plant. Handing on hazard and risk information from manufacturer to importer to wholesaler, retailer (or hire company) to employer to operator is the key element.

Q.34. There should be mutual recognition of the need for safe design and ability to prosecute across jurisdictional barriers in Australia. The ohs of the design of plant etc outside Australia should be the responsibility of the Australian importer, and enforced via Commonwealth legislation. I am disappointed by the number of imported commercial chemicals I come across, where the importer has ignored labeling requirements of Australian Dangerous Goods legislation.

Q.35. No comment.

Q. 36. No comment.

'Reasonably Practicable' and Risk Management

Q.37 and 38Q. Matters to be taken into account for 'reasonably practicable' are given in section 20(2) of the *OHS Act 2004* Vic. They are repeated in WorkSafe Victoria's guideline on this issue. However, these matters are not a definition of 'reasonably practicable'. Like other areas of OHS law, it would be useful to duty holders to have greater clarity of 'reasonably practicable' (as outlined in Chris Maxwell's chapter 10 of his *Occupational Health and Safety Act Review* paper of March 2004) in legislation – to create greater certainty. Clear tests would assist.

Q.39. No comment.

Q.40. As argued in Q.12: The labour hire industry has called for the incorporation of 'degree of control' in legislation. Barry Sheriff's paper on 'The Concept of Control in Determining OHS responsibilities: A need for clarity' – establishes the need for clarification of 'degree of control' in legislation (as distinct from the more general issue of degree of liability). Clarification of 'degree of control' as an element of the OHS degree of liability in OHS legislation would assist all stakeholders to understand their responsibilities.

Q.41. Tests and examples in section 12 (of *OHS Act 2004* Vic) guidelines or guidance notes of 'reasonably practicable' would help all stakeholders.

Q.42. Yes, as argued in Q.14: : 'Hazard' eg 'hazard refers to anything that can cause harm, especially a source of potentially damaging energy'; 'Risk of injury or illness' eg 'the injury or illness consequence of a hazard and the likelihood of that consequence arising'.

Q.43. I do not think that 'risk management' should be linked to 'reasonably practicable' – they are distinct and different concepts.

Q.44. 'Risk Management' is one tool of many for OHS compliance. Useful to mention it, but only as one such tool.

Consultation, Participation and Representation

Q.45 and Q.48. Yes, consultation in the workplace is a key element of OHS and a model of good general management in the workplace. As Robens argued, consultation should be a requirement of any OHS Act, but the exact mechanisms of consultation (tool box meetings, health and safety reps, use of OHS committees etc) should be left to each enterprise. "Consultation" needs to be defined, eg as recommended under Q.14: 'Consultation is a process of asking people for their opinions, ideas and information as part of the decision making process. Those consulted do not make the final decision; the responsible manager makes the final

decision. Management should explain the reasons for the final decision to all those who participated in the consultation’.

Q.46 and Q.48. Consultation with all workers (employees, labour hire personnel, casuals, contractors) in the workplace should be required – anyone that is affected by a hazard or risk or change to a system or procedure.

Q.47. No comment.

Q.49 and Q.56. The use of health and safety representatives and health and safety committees are only two methods of consultation in the workplace – and most appropriate for the minority of businesses in Australia – those with more than about 50 employees. The use of health and safety reps and committees should be optional for smaller organizations, and recommended for larger organizations.

Q.50. A duty on the employer ‘to consult’ and an ‘issue resolution’ duty should suffice to ensure effective participation and representation of workers.

Q.51 to Q.54. I think the provisions for health and safety representatives and committees in the *OHS Act 2004 Vic* are adequate.

Q.55. and Q.57. In larger organizations, I think it is appropriate that there be a requirement that BOTH the employee representatives and the management representatives are entitled to the same initial OHS training and update training. Only then can we ensure that the ‘mutual interest’ Robens speaks about can be implemented in larger workplaces. I do not think that prescribed training or qualifications in Acts will help workplaces – those with a good culture will ensure training, those with a bad OHS culture will not train their people. An option to attend an approved (by the Regulator) course should be available in the regulations.

Q.58. No comment.

Q.59. Yes, the trade union right of entry is important to balance out the power of the employer in organizations with ‘bad’ ohs culture.

Q.60. Yes, per *OHS Act 2004 Vic*, training and qualifications for such persons should be specified. The minimum training should be that approved by the Regulator for employee and management representatives, which I have suggested in Q.55.

Q.61. Right of entry should apply only where there is evidence of potential or actual contravention of the Workplace health and safety Act or evidence of immediate severe threat to health and safety.

Q.62. In principle, the provisions of the *OHS Act 2004 Vic* seem adequate re powers, conditions and limitations on right of entry.

Q.63, 65 and 66. Issue resolution is a key element to prevent OHS issues becoming OHS disputes. Disputes polarize people – OHS should be of mutual interest to both employers (and their managers) and workers (as Robens argues). I think the issue resolution provisions in the *OHS Act 2004 Vic* and the OHS Regulations 2007 Vic are sufficient.

Q.64. Issue resolution procedures should be activated when there is a disagreement between employee(s) and manager(s) on something that is a potential breach of the OHS Act or regulations.

Q.67.and 68. It would be useful for the model legislation to reflect the common law right of any person to stop work where they believe there is an immediate threat to their own health and safety from continuing the work. Otherwise the provisions in the *OHS Act 2004 Vic* re ability of management or employee health and safety reps to cease work seem adequate to cover ceasing work for OHS reasons.

Q.69. Yes, wages and normal benefits should be paid during a cease work – to balance the power held by the employer against the lack of power of the worker.

Q.70. Cease works must be resolved – either by inviting in an inspector from the Regulator or via an issue resolution procedure.

Q.71. Agree that those who should be protected are those in the workplace who:

- raise ohs issues
- carry out ohs functions
- refuse to undertake work they consider to be unhealthy or unsafe.

This would include: employees, labour hire personnel, contractors, casuals, managers, supervisors and potential employees (per 76(1)c of the *OHS Act 2004 Vic*).

Q.72 and 73 and 74. The Regulator and those alleging they were discriminated against should be able to bring prosecutions – which should be based on the ‘balance of probabilities’. The burden of proof should be on the Regulator or the person alleging discrimination.

Q.75 The Regulator should provide ongoing protection for those who have alleged to be discriminated against – ie before proceedings.

Q.76. Remedies for victims should include: reinstatement to all workplace benefits and employment, requirement on the employer to remedy the ohs issue under dispute and, where reinstatement not possible or not desirable, monetary compensation.

Q.77 Resolution of disputes by mediation, conciliation or arbitration is more desirable than legal court proceedings.

Q.78 No comment.

Regulator Functions, Powers and Accountability

Q.79. Establishment, powers etc of regulator should be left to the States and Territories.

Q.80 Yes, regulators should be required to publish enforcement and prosecutions policy, as is Victoria.

Q.81. Yes, interpretative documents, similar to section 12 of *OHS Act 2004 Vic* should be available – see Bob Stensholt’s 2007 review of the *OHS Act 2004 Vic*.

Q.82. No comment.

Q.83 and 85. Inspectors should be able to advise on ‘what compliance looks like’. Beyond that, an Inspector is fundamentally there to enforce OHS law. Another section, within the Regulator, should have the sole role of giving advice and

preparing guidance notes, draft Codes of Practice etc. The Regulator must be seen to be avoiding a conflict of interest.

Q.84. Leave appointment etc of Inspectors to each State and Territory.

Q.86 To avoid corruption, Inspectors should always be accountable to the Regulator, who should be accountable to the Minister, who should be accountable to Parliament.

Q.87 and 88. Review of Inspector's decisions should be made by a semi-independent group – per arrangement within WorkSafe Victoria.

Q.89. No comment.

Compliance and Enforcement

Q.90 and 91. A hierarchy of enforcement is desirable – but very difficult to implement. If there is a death in the workplace, a Prohibition Notice, alone, is an insufficient response. Each Regulator should have available to them the full range of the responses within the hierarchy, but not be required to enforce as a hierarchy, but have the flexibility to respond as the circumstances require. The hierarchy should be part of the induction training of Inspectors and be incorporated into standing procedures – with the cautionary notice to apply the provisions where applicable.

Q.92. and 94 and 96. The provisions for PINs, improvement notices and prohibition notices in the *OHS Act 2007 Vic* and WorkSafe Victoria's procedures for review seem adequate.

Q.93 As far as practicable, PINs, improvement notices and prohibition notices should contain an idea of 'what compliance looks like'. However, the employer (especially medium to large employers) often have better detailed knowledge of equipment, systems etc than the Inspector. There must be the opportunity for the employer to propose practical ways of compliance and for Regulator to consider those.

Q.95 There should be provision for the Regulator to require minimum time for compliance or for the employer to draw up a schedule of compliance. There needs to be flexibility here: high risk situations require urgent action; however, to maximize the reduction in risk, a temporary, medium term and then long term solution may be appropriate.

Q.97. Infringement notices are of dubious benefit – they do not require the change of the process, equipment or system to gain an elimination of the hazard or a reduction of the associated risk.

Q.98 No comment.

Q.99. No comment.

Q.100. No comment.

Q.101 & 102. Yes, there should be provision of enforceable undertakings as an alternative to prosecution. The Queensland provision – of not requiring an admittance of fault of liability - seems useful. Where the risk is not high, alteration of

the equipment, process or system over time is the desirable outcome – not achieved by fines, but is achieved by mutual agreement on what needs to be changed.

Q.103 No comment.

Prosecutions

Q.104 & Q105. A mixture of both criminal and civil procedures seems to provide the degree of flexibility that recognizes the seriousness of some offences (criminal charges needing to be proved beyond reasonable doubt – eg senior officer liability) and offences that should be judged on the balance of probability (eg discrimination charges).

Q.106 and 107. The court or tribunal where the prosecution is heard is less important than the magistrate, judge or tribunal member understanding workplaces and occupational health and safety. This understanding can either be gained by training or by having a court/tribunal OHS advisor.

Q.108. The standard appeals system in Victoria seems satisfactory (albeit expensive). I do not know the pros and cons of other jurisdictions.

Q.109. No comment.

Q.110. The Regulator would seem to be the most appropriate body to launch prosecutions, except in the case of alleged discrimination – where the alleged victim should also be able to prosecute.

Q.111 to 115. No comment.

Q.116. Codes of practice and regulations and Australian Standards referred to in Regulations and Codes (but NOT guidance notes or other advice) should be able to be tabled in evidence – demonstrating that the information on compliance / prevention / foreseeability was available but not followed by the alleged offender. I think it is reasonable that the alleged offender can argue that the specific system / procedure / equipment achieved the same aim as the Code / Australian Standard – given the complexity and rate of change in workplaces.

Q.117 to 121. No comment.

Q.122 to 127. Officers, as defined in the Victorian *OHS Act 2004*, should be held liable for serious offences, under the provisions and exceptions in that Act. This section of the Act is as yet untested in court – so it is not clear whether it will achieve the intention of holding senior officers accountable, while providing sufficient protections for them. Reverse onus of proof is not helpful. Volunteers in officer positions should not be held liable under the provisions of the Act – volunteers are less likely to volunteer if they are legally to be treated as if paid to accept liability.

Q.128 to 133. No comment.

Q.134 and 135. The full range of possible options to fines should be available, to allow the court flexibility in determining which punishment is appropriate for which offence, taking into account all the circumstances. Thus I support: imprisonment for very serious offences; enforceable undertakings, restoration, publicity orders, payment of investigatory costs, undertakings to implement training.

Q.136 to 138 Death in the workplace is a highly emotional issue. Prison sentences should be available, including for those whose infrastructure (ie outside the workplace and not the employer) was directly involved in the death. Reverse onus of proof is not appropriate.

Q.139 & 140. The proceeds of winding up a company, including salary and bonuses to proven offenders, should be available to courts to pay penalties.

Q.141. No comment.

Other Issues

Q. 142. The making of regulations should be restricted to achieving the objectives and principles of the Act.

Q.143. No comment.

Q.144. Per comment on Q.116: Codes of practice and regulations and Australian Standards referred to in Regulations and Codes (but NOT guidance notes or other advice) should be able to be tabled in evidence – demonstrating that the information on compliance / prevention / foreseeability was available but not followed by the alleged offender. I think it is reasonable that the alleged offender can argue that the specific system / procedure / equipment achieved the same aim as the Code / Australian Standard – given the complexity and rate of change in workplaces.

Q145. No comment.

Q146 and 147. I support the provisions made by the *OHS Act 2004 Vic* and the provisions for review established by WorkSafe Victoria. That is – independent internal review by Regulator, with ability to appeal to VCAT.

Q148. Tripartite provisions should be explicitly expanded to quadpartite provisions, ie: regulator, representatives of employees, representative of employers and representatives of the OHS profession. This should be embodied in the model OHS Act.

Q.149. No comment.

Q.150 and 151. A key objective of model OHS laws and regulations should be the uniform imposition of competence based training for permits and licensing. Once uniform competency based training is in place – mutual recognition should be implemented.

Q.152. Another key objective of model OHS laws and regulations is that they should be adopted by all States, Territories and the Commonwealth. Inspectors in each jurisdiction should then automatically be able to investigate and refer prosecutions to the appropriate jurisdiction.

John Knowles.